FILED
OCT 22 1979

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-659

DEERING MILLIKEN, INC.,

Petitioner,

v.

DUPLAN CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Deering Milliken, Inc. ("DMI"), asks this Court to review the judgment of the Court of Appeals for the Fourth Circuit in the case of *Duplan Corp.* v. *Deering Milliken Inc.*

Opinions Below

The Opinion of the court of appeals is reported at 594 F.2d 979. The opinion of the trial court, the District Court for the District of South Carolina, is reported at 444 F. Supp. 648.

These opinions are reprinted in the Joint Appendix being separately submitted by DMI and other petitioners.

Jurisdiction

(i) The judgment of the court of appeals was entered on March 26, 1979.

(ii) A timely petition for rehearing was denied by the court of appeals on May 29, 1979. The time within which to file a petition for a writ of certiorari was extended to September 26, 1979, by order of the Chief Justice dated August 21, 1979, and was further extended to and including October 22, 1979, by order of the Chief Justice dated September 21, 1979.

(iii) Jurisdiction to review the judgment of the court of appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

Questions Presented

This case raises critical questions about the continuing conflict between the patent laws and the antitrust laws, as well as questions about the outer limits of the concept of Sherman Act conspiracy.

As the courts below noted, "the facts are not in substantial dispute," 444 F. Supp. at 675, A43. The governing legal principles, however, are in very substantial dispute. The issues are quite simple.

The dispute centers on the settlement of patent litigation between rival patent licensors. Deering Milliken Research Corporation ("DMRC"), a subsidiary of petitioner, and Moulinage et Retorderie de Chavanoz ("Chavanoz") were members of one licensing group. Leesona, Inc., not a party here, was the only rival licensor. Respondents, plaintiffs below, are licensees who claim that the 1964 settlement of litigation about patent validity and infringement between

the rival licensors constituted a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act. Since there was no evidence that petitioners and Leesona did anything more than settle because they recognized the mutual undesirability of continued litigation, the judgment below presents the following questions:

1. Whether the Sherman Act forbids settlement of patent validity and infringement litigation as inherently a combination and conspiracy in restraint of trade and a monopolization.

2. Whether it is, *per se,* a conspiracy in violation of the Sherman Act if one competitor articulates his perception of an obvious commercial reality and another competitor subsequently behaves as that commercial reality dictates.

Since the courts below said that petitioners were liable for patent-antitrust violations by Leesona after the settlement, though petitioners participated neither in the violations nor at the trial in which Leesona was held liable, the judgment below presents the additional question:

3. Whether a party who settles patent litigation is liable in triple damages to those hurt by antitrust misuse of its patents by the other party to the settlement. Whether, in other words, a party settling patent litigation thereby becomes the guarantor of the other party's use of its patents.

Since petitioner, which was not a party to the licenses or the settlement, was held liable for acts of its subsidiary, DMRC, the case also presents the question:

4. Whether, as a matter of federal law, a parent can be held liable for the acts of a subsidiary when the parent's control has not been misused to commit a fraud or injustice.

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

Statement of the Case

Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331, 1332, 1337, 1338, 2201, and 2202.

The structure of the case is simple. The courts below held that a settlement of patent litigation between rival licensors was "anti-competitive" because of the "surrounding circumstances," and hence a violation of Sections 1 and 2 of the Sherman Act. (444 F. Supp. at 685, A66-67.) Licensees were held injured and entitled to recover triple damages.

The Parties and Their Relationships

Beginning in 1953, Chavanoz, a French firm, obtained a number of patents in France and the United States relating to the "false twist" process, a method of giving texture and

elasticity to synthetic yarns. Chavanoz licensed a French manufacturer of textile machines, Ateliers Roannais de Constructions Textiles ("ARCT-France"), to manufacture and sell machines embodying the Chavanoz process. (444 F. Supp. at 661, A11; A350.)

In 1957, Chavanoz entered the American market. It granted exclusive use rights, with the right to sublicense, to DMRC, a subsidiary of petitioner DMI, an American textile manufacturer.* DMI was not a party to the license arrangements. Whitin Machine Works, a Rhode Island machinery manufacturer, was chosen to sell ARCT machines in the United States. Subsequently, ARCT, Inc., a North Carolina subsidiary of ARCT-France, was organized and replaced Whitin as the exclusive distributor of ARCT machines in the United States. (444 F. Supp. at 663, A15; 444 F. Supp. at 664-65, A18-20.)

Thus, the arrangement was that Whitin sold false twist machines to American textile manufacturers and DMRC licensed those who purchased, sharing the royalties with Chavanoz.

At the time Chavanoz entered, the American market was, and for several years had been, dominated by Leesona, Inc., which manufactured and sold false twist machines and also issued to purchasers separate, royalty-bearing licenses of the right to use the process under Leesona's United States patents. (444 F. Supp. at 675-76; A44, 46-47.)

Though this action is a consolidation of lawsuits that began in a variety of ways, DMI, DMRC, Chavanoz, ARCT-France, and ARCT, Inc., were in the position of defendants below as to the antitrust claims that form the subject of

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* DMI, DMRC, and Chavanoz have new corporate names but will be referred to in this petition by the names they held at the inception of this litigation.

this petition. This petition is filed on behalf of DMI; DMRC, Chavanoz, ARCT-France, and ARCT, Inc., are petitioning separately. Leesona, although it played a crucial role in the events leading to this litigation, is not a party. Respondents, in the position of plaintiffs below on the antitrust issues, are textile manufacturers that purchased ARCT machines and took sublicenses from DMRC. They are known in the industry as "throwsters."

The Inception and Nature of This Litigation

In 1968, Chavanoz and DMRC sued a throwster for unpaid royalties. Other throwsters stopped payments, and more suits for royalties and patent infringement were filed. In late 1969, a throwster for the first time raised an antitrust claim. Eventually, all of the nineteen throwsters that are respondents here filed antitrust claims. A total of thirty-seven actions were consolidated and tried in the United States District Court for the District of South Carolina. Seven of DMRC's eight patents were held invalid and several, including the one held valid, were held not infringed. Issues of patent validity and infringement are not raised in this petition. In addition, the trial court ruled in favor of plaintiff throwsters under Sections 1 and 2 of the Sherman Act. These rulings are the subject of this petition.

The legal theory adopted by the district court, and upheld by the court of appeals, is that the settlement of patent litigation between the Chavanoz group and Leesona in 1964 violated the Sherman Act. The settlement, the courts held, injured the throwster licensees in two ways: through the license fees thereafter paid to DMRC; and through Leesona's arrangements, subsequently held illegal in another case, with other false twist machine manufacturers. DMRC and Chavanoz were not only held liable, along with others,

for the license fees paid DMRC after the settlement, but also for the illegal arrangements between Leesona and other manufacturers. DMI was held responsible for all of this as the parent of DMRC.

This case, therefore, turns upon the legality of the settlement with Leesona.

The Leesona Litigation and Its Settlement

Leesona began selling false twist machines and licensing their use in 1954. It had no competitors in that line of business in the United States. In 1957, the year that Chavanoz began making arrangements to enter the American market, Leesona obtained three broad patents covering all false twist machines. (A349-51.) It asserted those patents vigorously, and DMRC and Chavanoz fully expected the suit for infringement brought by Leesona in 1960 soon after shipments of ARCT machines to the United States began. DMRC and Chavanoz instigated a counter suit by Whitin seeking a judgment that the Leesona patents were invalid and not infringed. Meanwhile, Chavanoz was suing Leesona for false twist patent infringement in France. (A351-55.)

Sporadic settlement efforts occurred during four years of litigation in France and the United States, but no particular progress was made until early in 1964, when the Whitin lawsuit was on the verge of trial. (A374-81.) During the negotiations there were two communications between the parties relating to what the district court later termed their "mutual interdependence." The obtrusive fact was that the Chavanoz-DMRC side was in a poor tactical position. If Leesona won the patent litigation it could exclude the ARCT machine and DMRC would have nobody to license. If Whitin broke the Leesona patents, Leesona would sell machines without any royalty-bearing license and DMRC would be unable to charge royalty for the ARCT

machines. This obvious commercial reality led Robert Leeson of Leesona to say to Leo Soep, you represented Chavanoz, "If you win you lose, and if you lose, you lose—because if the patent is broken there will be no royalty." (444 F. Supp. at 680, A54.) Subsequently, after the general terms of the settlement had been worked out, Norman Armitage of DMRC objected to a provision that protected DMRC's obligation to pay Leesona $150,000 out of royalties by stating that if the royalty rate was reduced, DMRC would nevertheless compute the payment to Leesona at the present rate of royalties. Armitage told Leesona's patent counsel, Al Davis, that this provision might raise antitrust problems as a penalty against reducing royalties. Armitage stated that there was no practical reason for the provision since "there is no reason for us to reduce royalties unless you force us to do so." Davis said, "yes." Armitage said, "yes." Davis said, "yes," once more and Armitage then repeated that he wanted to avoid the appearance of penalty. (A381-82.) Davis said he would raise the point and the provision, which Leesona had inserted without discussion, was ultimately dropped.

The settlement itself was fairly narrow. Each side was left free to develop new machines as well as patents which they could assert against each other. They agreed merely that they would not sue each other, or each other's licensees, for infringement by existing machine models or for infringement of specified existing patents. DMRC was to pay Leesona $150,000 from future royalties. (444 F. Supp. 680-81, A56-57.)

With the patent litigation out of the way and throwsters no longer concerned about Leesona lawsuits, the sale of ARCT machines and the licensing of Chavanoz patents grew rapidly, breaking Leesona's monopoly. Within 5 years, ARCT machines constituted an estimated 20% of all false

twist machines being used in this country. But in that same year, 1969, the first throwster stopped paying royalties and the first step toward this litigation was taken.

Reasons for Granting the Writ

The judgment below deserves review by this Court because it adopts principles that revolutionize crucial aspects of the law of patents and antitrust, the law of antitrust conspiracy, and the law of causation of antitrust injury. In addition, review is required to resolve a conflict between the circuits concerning the liability of a parent corporation for its subsidiary's violation of federal law.

The antitrust law created and applied in this decision is, of course, in square conflict with the law of other circuits and with the law enunciated by this Court. The particular vice of the decision is not merely that it adopts erroneous legal principles but that it does so with only partial explicitness and candor, which gives these principles a greater capacity for growth and wide adoption than would otherwise be the case. Much of the change in substantive law is accomplished indirectly, by changing the rules concerning legitimate inferences of conspiracy from circumstantial evidence.

The courts below have created a rule that sinister significance is to be given to facts of a type that will invariably be present in patent settlements, in the conduct of the parties subsequent to patent settlements, and in the behavior of firms in concentrated industries. The result is a series of new substantive rules: that patent litigation may not be settled without Sherman Act liability; that a party who does settle with a patentee is liable not only for the direct "anti-competitive" results of the settlement but for subsequent behavior by the patentee which violates the Sherman Act; and that, whether patents are involved or not, con-

sciously parallel behavior constitutes illegal conspiracy if any industry member articulates the commercial reality that causes the behavior to be parallel.

These principles depart so far from existing law as to require review by this Court.

I.

The Writ Should Be Granted Because the Court of Appeals Has Adopted a Theory of Sherman Act Conspiracy Which, Contrary to the Law of Other Circuits, Makes Settlement of Patent Litigation an Antitrust Violation.

The judgment below changes an important legal rule by finding conspiracy in facts of a type that must always accompany a patent litigation settlement. The doctrinal revolution accomplished is not the less important (indeed, it is more potent) because it is not proclaimed as such. Other litigants and courts will rely upon the inference legitimated here and thus make patent litigation settlements impossible. If that is to become law, the new rule should be openly announced after its effects have been assessed by this Court. Such a profound change should be openly debated and chosen or rejected on its merits. That the district court and the court of appeals have changed that law does not admit of doubt.

The district court began with an innocuous formulation of the law which it quickly converted to a per se rule against settlement of patent litigation. Speaking of the settlement agreement, the district court said (444 F. Supp. at 685, A66-67):

> While on its face the agreement would not seem to offend the antitrust laws, when considered in the light of the surrounding circumstances and the actions of the parties both before and after its execution, the conclusion is that the agreement was anti-competitive and a restraint on interstate commerce in violation of Section 1 of the Sherman Act.

The "surrounding circumstances," however, were only normal commercial dealings and conditions of the sort necessarily present in any settlement. The court noted that Leesona and DMRC had royalty rates that were closely comparable for most production; that DMRC and Chavanoz had the opinion of patent counsel that the Leesona patents were vulnerable; that the settlement amounted to a cross-licensing of the patents; that the press release announcing the settlement was misleading in giving the impression that Leesona's victory in analogous Canadian patent litigation was a motivating factor in the settlement; and that there had been three instances of post-settlement cooperation between the parties. (444 F. Supp. at 685-86, A67-69.)

These "circumstances" are clearly of a sort typical of settlements. The Leesona and DMRC royalty rates were closely comparable for the same reason that the prices of *Time* and *Newsweek* are closely comparable: competition requires that the prices be close or one party will make no sales or licenses. The court thus fixed upon a fact of life in all concentrated markets, called it "mutual interdependence," and equated it with conspiracy. DMRC and Chavanoz had the opinion of patent counsel that Leesona's patents were "weak," just as every accused infringer has an opinion of counsel that his case is sound and the patents invalid. The settlement amounted to a cross-licensing of patents and hence conferred "the power to fix and maintain prices in the form of royalties which they consistently exercised thereafter" (444 F. Supp. at 686, A68-69), in the sense that any settlement allows both parties to continue with

their royalty programs. Each fixed and maintained its own rates and there was no evidence that either agreed with the other about those rates. If there is any significance to the finding that the press release gave a misleading impression of the motivations for settlement, it must be that settlement announcements are now subject to the same requirements of complete disclosure as stock prospectuses.

The instances of alleged post-settlement cooperation require mention because they, too, demonstrate that conspiracy was inferred from completely natural behavior. The first was a statement by an officer of Whitin to an officer of DMRC about "the desirability of indicating to the world at large that the Leesona and Chavanoz patents are strong." (444 F. Supp. at 681, A58.) This was not communicated to Leesona, so there can have been no agreement with a competitor. More importantly, it is inevitable that, after a patent litigation settlement, each party will want others to think it not worthwhile attacking the patents.

The second and third episodes are of a piece. DMRC turned down the opportunity to become the United States representative of a Finnish manufacturer's false twist machines (it was already licensing for Chavanoz), and added that the Leesona patents "would put a very considerable burden upon anyone attempting to introduce another false twist machines in the United States." (444 F. Supp. at 681, A58.) There was no proof of any "cooperation" with Leesona, the statement was undoubtedly true, and it is entirely normal for one licensor to hope that another licensor's patents will prevent additional competition. Similarly, an officer of DMRC made a diary entry indicating that he may have called Leesona's attention to the possibility that a false twist machine to be offered by Turbo Machine Company infringed Leesona's patents. (444 F. Supp. at 681, A58.) But no action directed against Turbo in any way

occurred. Nothing was done. The important fact here, however, is that the district court once more found evidence of conspiracy in normal behavior following a patent settlement. Since the purpose of patents is to exclude, there can be nothing wrong with one party to the settlement notifying the other of possible infringement by a third company.

The significance of this is that the court used these items —all of them entirely normal—to conclude that there was "recognized mutual interdependence," which was equated with conspiracy. The finding of conspiracy was thus a semantic transformation which will work whenever patentees settle litigation and go on about their businesses. The court's finding of "anti-competitive" effect is inherent in the existence of the patents and the fact of a settlement. That effect could have been avoided only if the parties had continued litigation to the destruction of the patent position of one or both. That is why this case works an alteration in doctrine: it effectively forbids patent litigation settlement.

That this novel principle underlies the decision here became absolutely clear in the Court of Appeals for the Fourth Circuit. For one thing, the court of appeals affirmed without opinion, which would have been impossible if the district court's principles had not been adopted. But the adoption of the district court's radical theory of conspiracy became explicit in the colloquy with counsel.

> Judge Bryan: One of the reasons for settling it on March 1964 was to avoid, among others, this attack that might nullify the Leesona patent.
>
> Mr. Topkis: Right.
>
> Judge Bryan: All right. Now, wasn't that a step towards stabilizing or keeping stable the royalties because had Leesona lost on that suit, as you said a minute ago, Leesona would be the renter because no royalties would be charged. And, of course, that

would be a terrible piece of competition for the other side.

Mr. Topkis: Right.

Judge Bryan: So in effect, didn't the agreement have that affect [*sic*]?

Mr. Topkis: I suppose that there's no argument, but that it does stabilize the situation. Of course, it did, but that is going to be true.

Judge Bryan: Wasn't that the mind of the contracting party?

Mr. Topkis: I have no doubt. I have no doubt that is true of every settlement, Your Honor. (Transcript of Argument, February 8, 1979, at 28-29.)

That *is* true of every settlement. Respondents attempted to portray this case as rare because the parties to the settlement shared a legal monopoly granted them under the patent laws. But that situation is not rare, and in any event the principle cannot be artificially so confined. It applies to any case in which both sides realize that patent litigation may make one or both worse off, and therefore settle. That has precisely the same "stabilizing" effect. It leaves the parties with the power to "fix and maintain" their royalty rates. The theory of this case is that patent owners must not only compete in royalties and other terms but must compete by litigation until all issues of validity and infringement have been definitively decided by the courts. That has never been the law before.

The court of appeals' approach is further shown by an exchange between Judge Phillips and counsel for DMRC immediately following upon that with Judge Bryan quoted above. Judge Phillips asked what cases supported a settlement agreement between competitors in "total domination of the discrete portion of the market." He then remarked:

> It seems to me that that's what we've come to finally is assessment of the obvious desirability of keeping open possibilities for settlement of litigation as against the possibility of monopolization necessarily present here. That's where we really are. (Transcript of Argument, February 8, 1979, at 30.)

And that *is* where we really are. The question in this case is whether rival patent licensors may settle litigation. Judge Phillips said the court had to assess the "desirability" of the opposing rules, and the conclusion went against permitting settlement. But whether the basis for the decision is candid assessment of the "desirability" of one policy rather than the other, or whether it is masked by legitimating an inference of conspiracy that no patentee who settles can escape, the result is the same: an operative rule that settlement of patent litigation violates the Sherman Act.

Indeed, the principle at stake is broader than a prohibition of settlement by rival licensors. It necessarily applies to settlement between the patentee and an infringer who is a potential licensee. When rival licensors settle, as here, at worst a legal duopoly is preserved. When a potential licensee settles with the patentee, a complete monopoly is preserved. When an allegedly infringing potential licensee who has a colorable defense of patent invalidity or noninfringement negotiates royalty terms with the patentee, the situation involves, just as does this case: recognition that each party may be better off if litigation is not carried to the end; preservation of the licensing program and the royalty structure; a stabilizing of the situation; and an effect that is, at least as the district court here used the term, "anti-competitive."

Respondents themselves recognized how broad and radical was the principle upon which their victory must rest—and strove mightily to avoid admitting it. The failure of their effort at avoidance only reemphasizes what law has been announced here.

During the argument in the court of appeals, Judge Phillips asked how two defendants situated as these were in the market could settle without violating the antitrust laws. Counsel for plaintiffs responded that "the first thing I would do is be absolutely sure that neither side discussed with the other side the pure commercial facts which dominated this settlement, and that is the desire of the parties to perpetuate the production royalties." (Transcript of Argument, February 8, 1979, at 42.) He went on to say that the parties "could have avoided discussing this—the perception as related to the effect on the Chavanoz program. They might have known it, but they didn't have to discuss it." (*Id.* at 43-44.)

That is, in fact, the theory of the judgment below: If, in the course of negotiating a settlement, either party mentions the commercial advantage of settling, the settlement is a conspiracy punishable by the Sherman Act. The upshot is that settlements are impossible because no negotiations can take place.

II.

The Writ Should Be Granted Because the Decision Below Adopts a Radical Concept of Conspiracy That Has Been Rejected by This Court and by the Other Courts of Appeals.

The theory of conspiracy adopted by the courts below is by no means confined to the context of patent litigation settlements. Both the courts and respondents made it clear that this case rests on a general view of the law of antitrust conspiracy. It is equally clear that that view expands the law of conspiracy far beyond permissible limits.

In support of its finding of a conspiracy, the district court framed a remarkable legal maxim (444 F. Supp. at 684, A63-64):

> An inference of conspiracy may be drawn from the fact that the competitors maintain parallel pricing structures which are interdependent.

That this extraordinary proposition cannot be the law is evident from the most elementary economic considerations. When there are two (or three or four) rivals in a market, it is inevitable that their pricing structures will be "parallel" and "interdependent." Since, by definition (if they are in the same market), the rival sellers' products or services are substitutes for one another, a change in the price of one will cause a change in the price of the other, and natural rivalry under free market conditions will produce parallel and interdependent price structures.

The judgment here adopts "conscious parallelism" as proof of conspiracy, a serious legal error. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). The rationale adopted here squarely conflicts with that of the Third Circuit in *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962). We know of no other circuit that has followed a rule that the mere presence of parallel prices which affect each permits a finding of conspiracy.

In the attempt to show that there is something more in the way of agreement, respondents argued that the crux of the illegality is that in the settlement negotiation the fact of "interdependence"—of the effect of the outcome of litigation on DMRC's licensing program—was mentioned. Thus, respondents told the court of appeals that *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969); and *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), all support the proposition that "Evidence of parallel conduct plus communications between

the competitors is sufficient to establish the combination or conspiracy." (Br. 70.) And, moreover, that "any communication between competitors, even the mere framing of an offer or of an indication of expected response to a competitive situation which comports with good business sense, followed by a response which accords with the conduct identified as desirable, is sufficient to establish a combination for Sherman Act purposes." (Br. 72.)

These are the principles upon which this judgment rests. They are the only principles upon which it could rest, for there was nothing here but recognized interdependence of the patent licensing programs and the statement, made as part of settlement negotiations, that interdependence was a fact. But these bald propositions, which the court of appeals and the district court accepted, do not state the law of conspiracy or anything resembling that law. Moreover, they do far more than make patent litigation settlements impossible. They make the most innocent and valuable commercial behavior illegal.

The first proposition, for example—that parallel conduct plus communication is proof of conspiracy—would convict all the firms in an industry whose prices moved in parallel fashion, as they always will, because one of them accurately predicted at a trade association meeting that shortages of raw materials or new demand would probably mean higher prices. This theory of conspiracy would, in fact, mean that any company's announcement of a price increase (or decrease, for that matter), followed by an industry trend in the same direction, convicts every company of a price-fixing conspiracy.

These are positions which commentators and the enforcement agencies have discussed but which the law has never reached, except in this case; and the conflict created by the Fourth Circuit's decision should be resolved by this Court.

III.

The Writ Should Be Granted to Resolve a Conflict in the Law of Antitrust Causation or "Facilitation."

Perhaps the most extraordinary legal proposition in a decision bristling with extraordinary propositions is the conclusion here that by settling a patent litigation a party becomes liable for the other party's misconduct involving the patents. This is an antitrust version of a dram shop act. The district court, in a decision approved by the court of appeals, held DMRC and Chavanoz liable for violations committed by Leesona (444 F. Supp. at 686, A70):

> . . . DMRC and Chavanoz by means of their trade-restraining combination with Leesona have knowingly facilitated the combination between Leesona and other competing manufacturers of false twist machines pursuant to licensing agreements which have been held by the Fifth Circuit to constitute per se violations of Sections 1 and 2 of the Sherman Act, *In Re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (1976), and by aiding Leesona in the furtherance of conduct thus held violative of the Sherman Act DMRC and Chavanoz have themselves violated the Act.

This strong statement is given meaning, as all precedents are, by the facts upon which the court found "knowing facilitation" to have occurred. DMRC and Chavanoz were not involved in Leesona's agreements with other manufacturers in any way. The most that can be said is that DMRC and Chavanoz should have known of those agreements and realized that by settling with Leesona they made those agreements possible. This is to place upon DMRC and Chavanoz the legal obligation to destroy the patents of a company which misused its patents in ways not in-

volving them, or pay triple the damage the other company caused.

This is law rather like the legendary, and perhaps apocryphal, rule that a soldier assigned to guard a military prisoner must, if the prisoner escapes, serve the prisoner's unexpired term. That is no longer military law, if it ever was, and the Fourth Circuit's analogue certainly cannot be antitrust law. Even the criminal law of "facilitation" requires that the person found guilty have acted with the purpose of aiding or promoting another's commission of a crime. See, *e.g.*, MODEL PENAL CODE § 2.06 (Proposed Official Draft, 1962).

This Court should review and reverse a law of causation or facilitation at once so draconian and so much at odds with existing law in other circuits.

IV.

The Writ Should Be Granted to Resolve a Conflict Between the Circuits and an Issue of Federalism Concerning the Liability Under Federal Law of a Parent Corporation for the Acts of Its Subsidiary.

This Court, so far as we have been able to ascertain, has never directly addressed the question of the circumstances under which courts will pierce the corporate veil and hold a parent company liable for the acts of its subsidiary. This is not a matter of state law only; it is accurate to say that something resembling a federal common law has been built up on the subject; and it is only proper that this should be so, for the issue is of central importance to the administration of many federal policies, including the federal antitrust laws. Uniformity, rather than diversity, is desirable where the impact of national policy is at stake.

The importance of the question to the administration of federal law makes it desirable that this Court grant certiorari to resolve a conflict between the law the Fourth Circuit enunciated and applied in this case and the contrary rules adopted by the Second and Fifth Circuits.

The district court found petitioner DMI liable for the acts of DMRC because Roger Milliken, the chief executive officer of DMI and also a director of DMRC, was found to have played a role in arranging DMRC's settlement with Leesona. The court's reasoning was as follows (444 F. Supp. at 688, A74):

> Roger Milliken is the president and chief executive officer of DMI, a very large, privately-held, diversified textile manufacturer engaged in a broad range of commercial textile operations. It employs 22,000 people in sixty-five plants located throughout the United States and Europe.
>
> Mr. Milliken is a man of exceptional ability and stature, and in addition to overseeing the operation of his own huge industrial empire, he holds directorships in several other industrial and financial institutions of national importance.
>
> Despite the demands on his time which his many outside activities involve the impression persists that Mr. Milliken maintains strong personal control over DMI and its subsidiaries, and although he must of necessity rely heavily on the managing officers of the various subsidiaries, major decisions are made by him.
>
> The Leesona settlement certainly was such a major decision, and there is little doubt that Mr. Milliken himself worked out the basic terms of the agreement which was eventually signed. . . .

Other facts which the trial court found pertinent are these: DMRC was not profitable, and DMI covered its losses; also

the subsidiary's annual budget, the scope of its operations, and such major decisions as whether to construct new facilities were reviewed by the parent.

The trial court held that these facts sufficed to make the parent accountable for the acts of its subsidiary (444 F. Supp. at 689, A77):

> [T]he conclusion is that DMRC was so dominated by DMI through its president and chief executive officer, Roger Milliken, in the conduct of its business that it must be held to have been merely an agency and instrumentality of its parent corporation in the transaction which led to the settlement of the Leesona litigation. Accordingly, liability for the resulting antitrust violations found to have been involved in the settlement must attach to DMI.

The "instrumentality rule," invoked by the trial court, was first formulated in POWELL, PARENT AND SUBSIDIARY CORPORATIONS (1931), and required for the parent to be liable both total domination of the subsidiary and, *in addition,* fraud or injustice resulting from misuse of the parent's control. The Second Circuit, citing Powell, so applied the rule in *Fisser* v. *International Bank,* 282 F.2d 231 (2d Cir. 1960). The Fourth Circuit's version of the instrumentality rule, however, is satisfied with far less. The trial court found that the chief executive officer of petitioner DMI worked out a settlement for DMRC that violated the law, not that DMI used its subsidiary for its own illegal purposes, or that DMRC was a mere agency for DMI's violation of any law.

Thus, in ruling that a creditor had not made the debtor corporation its instrumentality, the Fifth Circuit stated in *Krivo Industrial Supply Co.* v. *National Distillers and*

Chemical Corp., 483 F.2d 1098, 1106-07 (5th Cir. 1973), *modified on other grounds,* 490 F.2d 916 (1974), applying Alabama law as consistent with a more general body of law, stated:

> In addition to actual and total control of the subservient corporation, the "instrumentality" rule also requires that fraud or injustice proximately result from a misuse of this control by the dominant corporation.
>
> • • •
>
> [T]he instrumentality doctrine does not rest upon intent to defraud. It is an equitable doctrine that places the burden of the loss upon the party who should be held responsible. The basic theory of the "instrumentality" doctrine is that the debts of the subservient corporation are in reality the obligation of the dominant corporation.

In the case at bar, no throwster was misled to believe that it was dealing with DMI rather than DMRC or given any reason whatever to believe that it could look to the assets of DMI in any legal dispute with DMRC. Every throwster dealt at all times with DMRC, never with DMI. No throwster negotiated or dealt with Roger Milliken or any other DMI executive. Nothing in this record suggests any inequity or injustice in recognizing the separate corporate identities of DMRC and its parent. By affirming on the trial court's opinion, the Fourth Circuit put itself in conflict with the Second and Fifth Circuits' version of the instrumentality rule.

The conflict with the Second Circuit exists on another aspect of the rule as well. Roger Milliken was chief executive of DMI, but he was also a director of DMRC and as such legally obligated to play a role in the affairs of that company. There is no evidence that what he did was done

for DMI rather than for DMRC. The Second Circuit's *Fisser* decision held that similar facts precluded the imposition of liability on the parent (282 F.2d at 238):

> The proofs do not show that . . . executives of the [parent corporation] were directly meddling with the management of [the subsidiary's] affairs: it is equally plausible to ascribe the acts to the same individuals as [executives of the subsidiary] participating in a manner normal and usual for stockholders and directors of an independent corporation. It would, of course, be a complete disregard of the basic structure of corporation law to hold that that [the subsidiary], merely because it elected [the parent's] officers to be its officers, forfeited its entity and deprived its parent-stockholder of immunity from liability for its contract [citations omitted].

There are, then, two areas of conflict between the Fourth Circuit and other circuits concerning the liability of a parent corporation for the acts of its subsidiary. That conflict should be resolved by this Court.

But aside from those conflicts, the issue is one of general importance. The laws of the various states permit separate corporate forms and a consequent limitation of liability. The application of federal law in ways that routinely defeat these state policies raises an issue of federalism which ought to be addressed. While federal policy may arguably be made more effective if the separate corporate entities created under state law are ignored or easily collapsed, there is no reason to suppose that Congress intended any such result in enacting the Sherman Act. It is more probable that the Sherman Act was intended to operate within the context of state laws defining corporate forms and liabilities. In any case, the question of the criteria governing federal destruction of state distinctions

between parent and subsidiary is of sufficient general importance to warrant resolution by this Court even in the absence of the conflict between the circuits that exists.

CONCLUSION

For the reasons stated, petitioner requests that its petition for a writ of certiorari be granted.

Dated: October 22, 1979

Respectfully submitted,

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